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STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

MEMO ENDORSED

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ATTORNEY GENERAL

DIVISION OF STATE COUNSEL
LITIGATION BUREAU

BY ECF AND E-MAIL

The Honorable Colleen McMahon
United States District Court
Southern District of New York
500 Pearl Street
New York, NY 10007

May 7, 2021

RE: The Clementine Co. LLC, et al. v. Cuomo, et al., No. 20-cv-8899

Dear Judge McMahon:

This Office represents defendants Andrew M. Cuomo, in his official capacity as Governor of the State of New York, Letitia James, in her official capacity as Attorney General of the State of New York, and the State of New York ("State Defendants"). We write with regard to Plaintiffs' motion, filed on May 5, 2021, for leave to amend the complaint. (ECF No. 73.) By operation of SDNY Local Civil Rule 6.1(b), Defendants' opposition to the motion is due May 19, 2021. Because Plaintiffs have sought expedited treatment of their motion, however, State Defendants, jointly with Defendant New York City Mayor Bill de Blasio, now write to inform the Court of the grounds for their intended opposition to the motion for leave to amend and respectfully request that the Court confirm that they have until May 19, 2021, to file such opposition.

Defendants intend to oppose Plaintiffs' motion on futility grounds. As the Court is likely aware (but as Plaintiffs declined to address in their memorandum), on May 3, 2021, Governor Cuomo announced that the percentage- and numerical-based restrictions on theater capacity at issue in the proposed amended complaint will be lifted in their entirety as of May 19, 2021 – less than two weeks from now.¹ Thus, Plaintiffs' request for leave is futile as the proposed amended complaint fails to present this Court with a live case or controversy. See, e.g., 421-A Tenants Ass'n, Inc. v. 125 Ct. St. LLC, 760 F. App'x 44, 51 (2d Cir. 2019) (internal quotations omitted) (explaining that "[f]utility remains a ground on which denial of leave to amend has long been held proper" and upholding denial of leave where the amended complaint would have been time-barred); Ruffolo v. Oppenheimer & Co., 987 F.2d 129, 131 (2d Cir. 1993) ("Where it appears that granting leave to amend is unlikely to be productive . . . it is not an abuse of discretion to deny leave to amend.").

Moreover, Plaintiffs' tactical decision not to seek to resuscitate this matter until the last possible moment – despite the Court having directed Plaintiffs to move for leave to amend if they

¹ <https://www.governor.ny.gov/news/governor-cuomo-governor-murphy-and-governor-lamont-announce-significant-easing-covid-19>

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wished to do so on March 29, 2021, over a month ago – is dilatory and prejudicial to Defendants. As noted above, Plaintiffs also ask the Court to accelerate the briefing schedule for their motion for leave to amend, improperly demanding that Defendants respond by Monday, May 10, 2021 – that is, within just three business days from when they made this request (and two business days from now). The Court should decline to do so, and should instead permit Defendants the default response period of 14 days, as set forth in Local Rule 6.1(b). In its order of March 29, 2021, the Court made clear its expectation of a “fully thought out response” regarding leave to amend. (ECF No. 70.) Plaintiffs’ demanded schedule is simply insufficient to properly address the issues, particularly in light of the imminent lifting of the challenged restrictions. The only reason that Plaintiffs provide for seeking such an accelerated briefing schedule is that they continue to be affected by the challenged capacity guidelines, but this is not a new circumstance. The current 33% capacity has been known to Plaintiffs since March 3, in effect since April 2, and in any event will be lifted on May 19. Plaintiffs cannot *now* complain that this is urgent enough to require such a sharp departure from the standard time frames for such a motion contemplated by the Local Rules.²

State Defendants and Mayor de Blasio therefore ask that, should the Court entertain Plaintiffs’ motion for leave to file an amended complaint, that their response be filed by Wednesday, May 19, 2021.

Defendants appreciate the Court’s attention to this matter.

Respectfully submitted,

/s/ Matthew L. Conrad
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cc: Counsel of record (by ECF)

² The undersigned counsel further notes that he will be indisposed for several days of Plaintiffs’ proposed briefing window for travel related to family commitments.